THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

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February 26, 1957

Honorable J. E. Winfree, Chairman
Committee on Criminal Jurisprudence
House of Representatives
Austin, Texas

Opinion No. WW-39

Re: Constitutionality of House Bill 72 amending juvenile statutes.

Dear Mr. Winfree:

Your inquiry concerning the constitutionality and validity of House Bill 72 has been received. Basically, only Sections 5 and 6 of Senate Bill 44, Acts of the 48th Legislature, Regular Session, 1943, purport to be amended. Sections 3, 12, 13, 14 and 17 are amended so as to refer to Sections 5 and 6. The amendment to Section 5 appears not to be subject to constitutional objection.

The proposed amendment to Section 6 of Senate Bill 44, as contained in Section 3 of House Bill 72, purports to vest in the Juvenile Court, in the case of a child fourteen years of age or older, charged with an offense which would be a felony if committed as an adult, discretionary power to certify said child for proper criminal proceedings making him subject to the actions of the Grand Jury as if the child were an adult. Under the terms of this amendatory act, the Juvenile Court could certify one juvenile above the age of fourteen years for criminal proceedings, making him subject to Grand Jury indictment as if he were an adult, and retain jurisdiction over another juvenile similarly situated. Section 3 of Article 1 of the Texas Constitution provides for equal rights and prohibits exclusive separate privileges. Equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution means substantially that all persons similarly circumstanced should be treated alike, both in privileges conferred and liabilities imposed. In other words, no greater burden should be laid on one than is laid upon another, similarly circumstanced, and in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. Barbier v. Connolly, 113 U. S. 27, 28 L. Ed 923.

No classification or standard is set up in the amendment to said Section 6 to guide the Juvenile Court in determining whether the juvenile above the age of fourteen years shall be tried as a criminal or remain subject to the orders of the Juvenile Court. In the absence of a reasonable classification, the Legislature could not arbitrarily provide for one juvenile to be subject to Grand Jury indictment and trial as a criminal and another juvenile to be handled as a delinquent child under the other provisions of said Act.

We are not unmindful of the decisions of courts of other jurisdictions upholding legislation similar to that proposed by House Bill 72. Somewhat similar provisions for transfer of juvenile offenders from the Juvenile Court to the regular criminal court are found in the statutes of many states. All are governed by constitutional provisions requiring due process, and our investigation shows that such provisions for transfer have been given effect by every court which has considered them. No court has held them to be unconstitutional, but the constitutional issues have rarely been fully discussed. See cases collected in Annotation, 48 A.L.R. 2d 663 at 686. Absolute discretion on the part of the district court to determine whether a boy under seventeen should be tried in the district court or in the Juvenile Court was given effect by the Court of Criminal Appeals in Ragsdale v. State, 61 Tex. Crim. R. 145, 134 S.W. 234 (1911) but without discussion of the constitutional issues. When a subsequent statute was urged as conferring the same discretion, the Court in McLaren v. State, 82 Tex. Cr. R. 449, 199 S.W. 811 (1917) held that no such discretion had been conferred by the statute and stated as follows:

> "The classification of persons amenable to punishment for crime, within constitutional limitations, is a legitimate exercise of legislative authority, but crimes and the punishment therefor must be defined by the lawmaking power, and operate in a uniform manner upon the individuals of the class embraced in the law. The intent to vest in the trial judge the discretion to determine which individual shall be prosecuted for a felony and which treated as a delinquent juvenile is not to be inferred. The power is doubtful because it would commit to the trial judge the arbitrary discretion to determine the grade of the offense, without judicial investigation of the facts, or facility for review."

The only case found in which the constitutional question was squarely raised and discussed is Macon v. Holloway, 96 So. 933 (Ala. App. 1923). The Alabama statute permitted the juvenile judge to transfer an offender after full investigation and a determination that he is "past reformation". The Court held the procedure to be valid. The above quotation from the opinion in McLaren v. State, supra, was specifically distinguished in the following language:

> "The (Alabama) act does not undertake to do any of the things which are referred to by the Texas court in the quotation ante. This act does not commit to the trial judge the arbitrary discretion to determine the grade of the offense. Neither does it commit to him an unbridled discretion to determine which individual shall be prosecuted for felony and which shall be treated as a delinquent juvenile. The extent of the judge's authority under section 20 of the act under review is to determine whether or not a juvenile offender can be made to lead a correct life and be properly disciplined. If the judge ascertains that he can, the right of the state to try him for a criminal offense is postponed. If the judge ascertains that the juvenile offender cannot be made to lead a correct life and cannot be properly disciplined, then the state may proceed in its court of appropriate jurisdiction."

We conclude that the standard of being 'contrary to the best interest of such child or the public', standing alone, is too broad and furnishes the judge no real guidance. Under such a test, appellate review would not reach arbitrary action by a Juvenile Court.

SUMMARY

> The last three paragraphs of said amended Section 6, appearing on page 3 of proposed House Bill 72, being a portion of Section 3 of House Bill 72, are, as presently worded, unconstitutional.
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> There appears to be no serious objection to the amendment to Section 5 of Senate Bill 44, as contained in Section 2 of House Bill 72, which

provides that the Juvenile Court, once having obtained jurisdiction, should retain jurisdiction until the child is discharged by the court or until he becomes twenty-one years of age, unless committed to the control of the agency of the State charged with the care, training, control of and parole of delinquent children, if this is the intention of the sponsors of the bill. It would appear, however, that the Juvenile Court, once having acquired jurisdiction, should retain jurisdiction so long as the child is to be treated as a juvenile.

The remaining amendments to the original Act as contained in House Bill 72 merely refer to Sections 5 and 6 as amended and need not be noticed further.

Yours very truly,

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By
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APPROVED:

OPINION COMMITTEE
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Chairman